

Decision **DRAFT DECISION OF ALJ GRAU** (Mailed 7/22/2003)**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking Into
Implementation of Assembly Bill 140,
Establishing the Rural Telecommunications
Infrastructure Grant Program.

Rulemaking 03-02-034
(Filed February 27, 2003)

**INTERIM OPINION ON IMPLEMENTATION OF THE
RURAL INFRASTRUCTURE GRANT PROGRAM****I. Summary**

Today's interim decision implements eligibility criteria for community-based groups to qualify to apply for telecommunications rural infrastructure grants and adopts interim grant program administration rules.

II. Background

We issued this order instituting rulemaking (OIR) into the implementation of California Assembly Bill (AB) 140 (Stats. 2001, Ch. 903), enacted on October 14, 2001, which created the Rural Telecommunications Infrastructure Grant Program. AB 140, codified at Pub. Util. Code § 276.5,¹ with a funding level capped at \$10 million per year, enables unserved communities to apply for grants of up to \$2.5 million for the construction of telecommunications infrastructure. AB 140 requires that grant proposals be submitted in accordance

¹ All statutory citations refer to the Pub. Util. Code, unless otherwise noted.

with procedures prescribed by the Commission and evaluated and awarded by the Commission using technology criteria developed by a government-industry working group.

The OIR requested comments on six issues:

1. Given the \$2.5 million annual cap on individual grant awards, how should the Commission deal with applications from communities whose estimated infrastructure construction costs exceed the \$2.5 million cap?
2. Should there be an annual funding allocation between large and small projects, i.e., 50% to projects under \$1million and 50% to projects over \$1 million? If a funding allocation is adopted, should any unused funds be made available for projects of any size?
3. Should there be fixed application filing deadlines each year or should applications be considered on a first-come, first-served basis until each year's grant funds are exhausted? Would considering applications on a first-come, first-served basis provide an unfair advantage to applicants whose projects are less complex and therefore take less time to prepare?
4. How should the Commission provide for unserved communities in unfiled territory if no carrier is willing to serve?
5. Should unserved communities with infrastructure construction costs exceeding the \$2.5 million annual cap be allowed to apply in successive years? To address this problem and ensure that infrastructure is completed, should the Commission earmark a portion of the annual funding for multiple-year grants?
6. How should the Commission resolve a situation where an unserved community falls within the filed territory of more than one telecommunications carrier?

The OIR also attached an application for the rural telecommunications infrastructure grant program (grant program) that included application information, instructions, and a checklist. (Rulemaking (R.) 03-02-034, Attachment A.) There is an initial qualifying phase, and the Director of the Telecommunications Division, or its successor division, will notify applicants if the application has passed that phase. Applicants must submit more detailed information on the project in the construction costs and feasibility study phase.

On April 14, 2003, six parties filed comments—the joint comments of Citizens Telecommunications Co. of California, Inc., Citizens Telecommunications Co. of the Golden State, and Citizens Telecommunications Co. of Tuolumne (Citizens); the Governor’s Office of Planning and Research ; SBC California; the Small LECS (Calaveras Telephone Company, Cal-Ore Telephone Co., Ducor Telephone Co., Evans Telephone Co., Happy Valley Telephone Co., Hornitos Telephone Co., Kerman Telephone Co., Pinnacles Telephone Co., The Ponderosa Telephone Co., Sierra Telephone Co., Inc., The Siskiyou Telephone Co., The Volcano Telephone Co., and Winterhaven Telephone Co.); The Utility Reform Network (TURN); and Verizon California Inc. (Verizon). All of the parties except the Governor’s Office of Planning and Research filed reply comments on April 28, 2003.²

III. Discussion

We adopt eligibility criteria for community-based groups to qualify for telecommunications rural infrastructure grants.

² TURN filed its reply comments one-day late with leave from the assigned administrative law judge.

A. \$2.5 Million Cap

Most parties oppose deviating from the statutorily imposed \$2.5 million cap. SBC California states there should be no deviance, and Citizens, Verizon, and the Small LECs state applicants must demonstrate they have secured funding exceeding the cap if proposed projects are in excess of \$2.5 million. Both TURN and the Governor's Office suggest the Commission assist applicants in seeking other resources by identifying those resources.

We concur that § 276.5 clearly limits the amounts applicants can receive as provided:

The procedures developed for awarding grants shall ensure that . . . no one applicant receive more than 25 percent of the designated program funds in a single fiscal year.
(§ 276.5 (e).)

We lack authority to alter the statutory scheme. However, applicants may propose projects whose costs exceed the \$2.5 million cap. In those instances, we must ensure that grant applicants seek to secure federal funding in conjunction with local subsidies, as required under § 276.5(c). Because funding sources can change and it is not clear we have the resources both to update funding sources and to administer the grant program, we will seek the parties' input in initially identifying funding sources. Our staff can provide that information in the application packet and update it as necessary.

TURN also proposes that applicants seek funding in more than one year. We will address that proposal below, in the section on grants in successive years.

B. Funding Allocation Between Large and Small Projects

No party supported allocating funding between large and small projects, although two parties did not oppose that allocation. Citizens, SBC California, Verizon, and the Small LECs oppose any allocation, because it is inconsistent with the legislative mandate to bring service to as many communities as possible. TURN is uncertain about the benefits of an allocation, and the Governor's Office states an allocation might prevent worthy projects from consideration. The Governor's Office supports ensuring that the most worthwhile projects serving schools, hospital, clinics, and the greatest number of households receive funding.

The concerns voiced by the parties about allocating funding between large and small projects have merit. We will not establish a percentage of small or large projects that are eligible to receive funding as a specific criterion for awarding funding. If necessary, we can consider the size of the project in awarding funding to ensure that small projects are represented among the projects chosen for funding.

C. Fixed Application Filing Deadlines

TURN, Verizon, and SBC California support a fixed filing deadline. Citizens and the Small LECs propose a rolling deadline in the initial year of the grant program and in subsequent years a priority deadline. The Governor's Office proposes releasing funds in two fixed-award rounds at six-month intervals.

Efficient administration of the grant program requires some form of fixed deadline. No party objects to a fixed deadline in subsequent project years, and there is no basis for failing to adopt one. Although we agree that some

initial flexibility could be warranted as communities attempt to meet the application requirements, we decline to adopt a rolling deadline in the initial project year in the interest of maintaining certainty and administrative efficiency in the application and approval process. The preferable means of establishing flexibility in the first year of the program is to adopt the Governor's Office's proposal for two fixed award rounds in that initial year. Thereafter, we will establish a single annual filing deadline that should permit applicants sufficient opportunity, given the two-phase application process, to meet our deadlines. We direct our staff to establish two application filing deadlines at six-month intervals in the first year grants are awarded and an annual deadline thereafter.

D. Communities in Unfiled Territory

Parties are divided on whether we have the authority to compel carriers to offer service in unfiled territories where there is no service provider. TURN asserts the Commission has the authority to order a carrier to serve, although TURN also states communities might be able to construct on their own. SBC California and Verizon contend we lack jurisdiction to order carriers to serve. Citizens and the Small LECs suggest it is uneconomic to construct in an unserved territory absent an external source of funding. The Governor's Office suggests wireless, small, or out-of-state providers could provide service in those areas.

Verizon, SBC California, and TURN concur that we have some authority under Section 214(e)(3) of the Telecommunications Act of 1996 to order an Eligible Telecommunications Carrier to provide basic service in an unserved territory, but they disagree as to the extent of that authority. TURN references our discussion in Decision (D.) 01-06-007, which approved a transfer of exchanges. SBC California states that authority is limited to when no common carrier will provide services supported by Federal universal service support

mechanisms under Section 254(c) of the Act. At this time, we do not have a request before us to require that a carrier serve a community awarded a grant under the grant program. Because a determination as to the extent of our authority may rely on the facts presented and because we contemplate approving grant awards via the resolution process, discussed below, we find it is not necessary to establish the extent of our authority in this interim decision.

E. Applications in Successive Years

TURN is the only party that supports permitting applications for grant awards in successive years. The Governor's Office conditionally supports successive awards should alternatives fail to work out. The Governor's Office's proposed additional restrictions would be a lower cap, completion of the initial phase, and consideration after other awards. SBC California, Verizon, Citizens, and the Small LECs generally agree that the legislation precludes awards in successive years.

Section 276.5(e) provides that not more than one grant can be awarded to a qualifying community. Although the statute limits a community to one grant and to receipt of no more than 25% of the program funds in a single year, it theoretically appears possible to award a grant of greater than \$2.5 million in successive years. However, it is unclear whether it would be cost effective to structure awards to receive funding over successive years. In addition, awarding a multi-year grant to a qualifying community in one year's pool might restrict the Commission's ability to award equally qualifying or better qualified communities grants in successive years. The preferable approach is to ensure grant applicants seek to secure additional funding, as required under the statute. For these reasons, we will decline to award projects grants in successive years and instead will review communities' plans to secure other sources of funding to

enable this grant program to serve the greatest number of qualifying communities.

F. Two Carriers' Filed Territory

Verizon and SBC California concur that cost effectiveness should determine which carrier should provide service when an unserved territory falls within the filed territory of two carriers. Citizens and the Small LECs believe that this scenario is infrequent and should be addressed on a case-by-case basis, because carriers have experience in adjusting boundaries. The Governor's Office supports a boundary exchange. TURN believes that the best carrier should serve.

We concur with Citizens and the Small LECs that there will not be many cases where unserved communities are contained in two carriers' filed territories. As suggested by Citizens, the Small LECs, and the Governor's Office, carriers can negotiate boundary adjustments, if the need arises. If these negotiations fail, we can examine the circumstances and resolve the issue in the resolution process, discussed below. Thus, we decline to establish a fixed procedure for resolving any potential boundary dispute.

G. Application

All parties offered revisions to the application form, Attachment A to the OIR. Parties suggested requesting additional information in the application including current and proposed telecommunications services, alternatives to the proposed technology, why alternatives are insufficient, support letters from government agencies, details on the population, whether the applicant has sought federal or other funding options, modifying the community and qualifying financial information language, providing more detail in schematic maps, and identifying that construction-cost estimates have been reviewed and

approved by the carrier. Our staff has considered these proposals and has revised the application form, as necessary.

Parties also expressed concern that this decision would adopt an application form which could subsequently be modified only by Commission order. In the interest of providing a publicly available form for potential grant program applicants, we will approve the application form attached as Attachment A to this decision. However, we will not require that future changes be made by decision. Instead, we can approve substantive changes to the form submitted to us by our staff in a resolution. We also permit the Director of the Telecommunications Division, or its successor division, to request additional information from applicants in writing.

H. Other Issues

1. CEQA Review

Verizon proposes that the Commission inform applicants as early as possible if the proposed project will trigger California Environmental Quality Act (CEQA) review and, if so, whether the Commission will serve as the lead agency under CEQA. The OIR noted that Phase I eligibility determinations would not trigger CEQA, but that Phase II might trigger environmental review. Our CEQA team necessarily is involved in project approval. We should be able to alert applicants to potential environmental review early in the Phase II process, but will do so no later than in the resolution approving the grant.

2. Incumbent Local Exchange Carrier Cost Recovery

SBC California proposes that incumbent local exchange carriers (ILECs) receive full expense recovery for construction and maintenance costs. Verizon recommends Z-factor recovery under the New Regulatory Framework

(NRF) program for feasibility studies and other reasonable infrastructure development costs, if the grant program does not fund them. Citizens and the Small LECs state feasibility study costs exceed the scope of what is required under line extension tariffs and that ILECs should be reimbursed in excess of the tariff-related analysis.

TURN responds that carriers have failed to show how feasibility studies mandated in the proposed application differ from what is required under their tariffs. TURN believes that grant money should be used to cover costs applicants would be required to incur under the line extension rules. TURN notes that concerns about costs for advanced services should not be a major issue, since AB 140 was designed to address basic service.

ILECs should be able to request recovery under the NRF limited exogenous factor mechanism, approved in D.98-10-026 for matters mandated by the Commission, for the incremental costs of feasibility studies under the grant program in excess of what is required under their tariffs. Similarly, if there are costs not covered under the line extension tariffs, carriers should be eligible for reimbursement for those costs as a limited exogenous factor. Receiving reimbursement under the grant program would be less efficient, since distinguishing between what is provided for under the tariff and what is incremental or excluded from the tariffs should not be part of, and could delay, the application and disbursement process. We will order ILECs that provide service under the grant program to establish memorandum accounts and track costs in excess of those contained in their tariffs. Tracking such costs is no guarantee of reimbursement of those costs.

3. Membership of Working Group

Two parties, SBC California and Verizon, nominated their companies for inclusion in the membership of the government/industry working group to develop technical criteria to use in evaluating grant awards. TURN nominated two individuals, former assembly member Virginia Strom-Martin and Steve Bowen, and also nominated Regina Costa as an additional member or an assistant to the group. Section 276.5 requires that the working group be composed of representatives from the commission, from ILECs, from competitive local exchange carriers (CLEC), and from the wireless industry. No CLEC or wireless carrier is a party to this proceeding, so we have received no nominations from those groups. Bowen, however, has expertise representing CLECs and as a public interest attorney.

TURN also recommended that the working group include representatives of the rural communities. Verizon disagrees with that proposal, because communities will apply for grants and each community will have its particular issues and needs.

We will limit composition of the working group to the representatives mandated by the statute and will approve one representative from SBC California, Verizon and our staff and the nominations of Strom-Martin, Bowen, and Costa. We approve membership of one representative from the wireless industry and direct our staff to find an individual willing and qualified to fill that vacancy.

4. Interim Grant Program Administration Rules

Citizens, the Small LECs, and Verizon recommend the Commission issue draft rules regarding administration of the grant program for comment. Verizon suggests that proposed rules be prepared concerning fund

disbursement, accountability, and project implementation. The parties correctly point out that the OIR did not specifically propose a comprehensive set of grant administration rules, although the OIR requested comment on some implementation issues and many grant administration criteria are included in the application guidelines. Although the parties requested the opportunity to comment on such rules, it is more efficient to adopt interim grant program administration rules and separately seek comment on those rules.

We will authorize our staff to initially select qualifying applicants and to propose for our consideration by resolution the applications to which we should award grants. In that resolution we will establish the procedures for awarding those grants based on the interim rules, discussed below, and adopted eligibility criteria.

Section 276.5 requires that a local agency or town, as defined by §§ 50001 and 21, respectively, of the Government Code act as the grant recipient's fiscal agent for the receipt and distribution of funds. Each grant applicant shall have an approved fiscal agent. We will order that all funds disbursed from the grant program be kept and maintained in a separate and distinct bank account with the approved fiscal agent as the sole trustee of such funds. The fiscal agent shall provide the account information 60 days prior to the first request for disbursement according to the approved payment schedule. Payments will be made after completion of approved milestones and upon request for payment from the fiscal agent according to the approved payment schedule. Payment requests shall include an itemized accounting of reimbursable amounts. The Commission shall disburse the funds within 60 days

of receipt of a complete request for payment that conforms to the approved payment schedule or as soon thereafter as is otherwise practicable.³

Section 276.5 also permits reimbursement for preliminary engineering feasibility studies, including but not limited to any approved cost of a local telecommunications carrier that contributes to the studies, to grant applicants whose proposals are rejected. Rejected grant applicants should submit a request for reimbursement and an itemized accounting of reimbursable amounts to the Commission within 90 days of the mailing of the notification rejecting the phase II, feasibility/construction, application. Phase I (qualifying) applicants cannot apply for reimbursement for feasibility costs should their application be rejected at that stage.

We will require that all funds be spent exclusively on telecommunications infrastructure and amounts necessary to comply with Commission grant administration directives. We will require the fiscal agent to provide an accounting, including expenditures and account balances, on a quarterly basis until no funds remain in the account. Upon completion of the infrastructure work, records should be reviewed by an independent Certified Public Accountant and an Attestation Report should be submitted to the Commission to ensure that the work was completed and paid for as represented.

Grant recipients shall complete the infrastructure work according to the approved milestones for project deliverables. Unanticipated construction and implementation delays should be reported to the Commission within 60 days of failure to achieve an approved milestone. Failure to secure funding

³ Budgetary constraints or other factors may delay release of funds.

for project costs exceeding the required project cap also should be reported to the Commission within 60 days or the failure to secure funding.

5. Statewide Public Information Meetings

The OIR proposed extensive statewide information meetings be held after the final decision issues. Citizens suggests it would be preferable to target information to the unserved areas. TURN supports statewide meetings. There is no policy reason to change our earlier recommendation that statewide meetings be held. However, budget constraints may limit our ability to conduct those meetings.

IV. Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on _____, and reply comments were filed on _____.

V. Assignment of Proceeding.

President Michael R. Peevey is the Assigned Commissioner, and Janice Grau is the assigned administrative law judge.

Findings of Fact

1. Efficient administration of the grant program requires some form of fixed deadline.
2. Incumbent Local Exchange Carriers (ILEC) may have costs for feasibility studies required under Pub. Util. Code § 276.5 in excess of tariff charges and other costs not provided for in line extension tariffs. ILECs that provide service under the grant program should establish memorandum accounts and track costs in excess of those contained in the tariffs.

3. Section 276.5 requires that the mandated working group be composed of representatives from the Commission, from ILECs, from competitive local exchange carriers and from the wireless industry. Parties nominated representatives from SBC California and Verizon, Virginia Strom-Martin, Steve Bowen, and Regina Costa. No representative of the wireless industry was nominated.

4. It is more efficient to adopt grant program administration rules on an interim basis than to issue proposed rules for comment and later decision.

5. No party has requested hearings.

Conclusions of Law

1. We should adopt, on an interim basis, grant program administration rules.

2. We should adopt the grant program application appended to this decision as Attachment A.

3. It is reasonable to permit ILECs to track in memorandum accounts incremental feasibility study costs and other costs in excess of costs included in line extension tariffs in order to request recovery under the New Regulatory Framework (NRF) limited exogenous factor mechanism. Tracking such costs is no guarantee of recovery of those costs.

4. It is reasonable to approve the nominations of Strom-Martin, Bowen, Costa and representatives from SBC California and Verizon to the working groups. It is reasonable to direct our staff to find a qualified representative from the wireless industry to serve on the working group and to approve a slot for a representative from Commission staff.

5. A subsequent ruling, by the Assigned Commissioner and ALJ, should address the process and schedule for further review of grant administration rules.

6. In order to permit timely compliance with the Legislative mandate of AB 140, which requires establishment of eligibility criteria for community-based groups to qualify to apply for telecommunications infrastructure grants by June 30, 2002, this order should be effective today.

INTERIM ORDER

IT IS ORDERED that:

1. Eligibility criteria for community-based groups to qualify to apply for telecommunications infrastructure grants are adopted as set forth herein.
2. Interim grant administration rules are adopted as set forth herein.
3. Incumbent Local Exchange Carriers may track in memorandum accounts incremental feasibility study costs and other costs in excess of costs included in line extension tariffs in order to request recovery under the New Regulatory Framework limited exogenous factor mechanism. Tracking such costs is no guarantee of recovery of those costs.

4. The government-industry working group shall be established as set forth herein.

This order is effective today.

Dated _____, at San Francisco, California.